THE HON'BLE SRI JUSTICE GODA RAGHURAM

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WRIT PETITION NO : 7042 of 2006

DATED: 10.04.2006

BETWEEN:

M/S G. K. Engineering Works .. Petitioner

And

The O.N.G.C. AND OTHERS

..Respondents

THE HON'BLE SRI JUSTICE GODA RAGHURAM

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WRIT PETITION NO :7042 of 2006

ORAL ORDER :

Heard Sri P.V.S.S.S.Rama Rao, the learned counsel for the petitioner and Sri Nuti Rama Mohan Rao, the learned counsel for the respondent No.4 and at the stage of admission the writ petition is disposed of.

The petitioner assails the letter addressed on behalf of the respondents 1 to 3 to the 4th respondent dated 31.03.2006 invoking the performance bank guarantee

No.2004/20, dated 06.07.2004 issued by the 4th respondent favouring the respondents 1 to 3 and calling upon the 4th respondent to issue a bankers' cheque/demand draft in favour of the Finance and Accounts Officer, O.N.G.C. Limited, Rajahmundry for the full amount of bank guarantee i.e. Rs.42,30,000/-.

The factual matrix is that the petitioner firm is in the business of undertaking engineering works of several clients including the ONGC as a contractor. It is registered as such with ONGC also. The 1st respondent issued a tender notification inviting bids for the works of design, engineering, supply and laying of 219.9 mm OD x 6.4 mm WT API 5L X-46 ERW Underground Oil Pipeline from Odalarevu Onshore Terminal to S.Yanam unloading point, on turn key basis.

The petitioner submitted its tender on 09.03.2004. The petitioner was also required to submit by way of demand draft or a bank guarantee in a value of 10% of the value of the works awarded, towards performance bank guarantee. The petitioner did submit such a bank guarantee issued by the 4th respondent on 6.7.2004, valid up to 31.3.2006.

According to the petitioner, it did not execute a formal agreement with the ONGC nor did commence any work. However, after some intermediary correspondence and mutual recriminations between the petitioner and the respondent Corporation, the ONGC by a proceeding dated 10.2.2005 cancelled the Letter Of Intent issued in favour of the petitioner on 15.4.2004. Even prior to the order dated 10.2.2005, the petitioner addressed a letter to the ONGC expressing willingness to perform the works in case of extension of time for 7 more months in addition to the time originally stipulated in the LOI dated 15.4.2004, is granted to him. This offer was not however taken up by the ONGC.

On 8.2.2006 the ONGC addressed the petitioner requesting the petitioner to extend the performance bank guarantee dated 6.7.2004 until 30.9.2006, pending a final decision on the release or otherwise of the bank guarantee submitted by the petitioner earlier. This communication of the ONGC informed the petitioner that the extension of the performance bank guarantee should reach the ONGC on or before 22.2.2006. On 22.3.2006 the ONGC addressed the 4th respondent bank intimating it of its request to the petitioner to extend the bank guarantee up to 30.9.2006 and calling upon the 4th respondent bank to consider its letter (dated 22.3.2005) as the

lodging of a formal invocation of the existing bank guarantee, in case the petitioner fails to extend the bank guarantee up to 30.9.2006. Thereafter and admittedly the petitioner extended the bank guarantee dated 6.7.2004 up to 30.9.2006 and the 4th respondent bank has also acknowledged to the ONGC the factum of such extension of the bank guarantee up to 30.9.2006.

Thereafter by the communication, dated 31.3.2006 (impugned in this writ petition) the ONGC invoked the performance bank guarantee. The petitioner asserts that the conduct of the ONGC is arbitrary, illegal, unfair and unethical and cannot be sustained.

Indisputably the performance bank guarantee invoked by the impugned proceedings of the ONGC addressed to the 4th respondent bank is unconditional and irrevocable. The law as to the circumstances in which the invocation of bank guarantee of such nature can be interdicted by judicial process is too well settled. It is not necessary to refer to the plethora of precedents on the issue which have spelt out the relevant principles n the area, as it would amount to idle parade of familiar learning. Suffice to record that the principle has been reiterated yet again after an extensive survey of relevant precedents, in ***B.S.E.S. Ltd (Now Reliance Energy Ltd) v Fenner India Ltd., and another ().***

It is now a settled principle that the bank guarantee is an independent contract between the bank and the beneficiary thereof. The unconditional and irrevocable bank guarantee which is invoked by the ONGC in this case is thus an independent contract between the 4th respondent bank and the ONGC. Consequent on the established principles reiterated in ***BSES Ltd*** (supra), irrespective of any dispute between the beneficiary and the party at whose instance the bank has given the guarantee (in the present case the petitioner), the 4th respondent bank is obliged to honour its guarantee. As pointed out in ***U.P. Cooperative Federation Ltd. V Singh Consultants and Engineers (P) Ltd (),*** a bank guarantee must be honoured in accordance with its terms as the bank, which gives the guarantee, is not concerned with the relations between the supplier and the customer and neither is the bank concerned with the question whether any of them had failed in their contractual obligations; the bank must pay according to the tenor of its guarantee, on demand, without proof or condition. Only two exceptions to this normative principle are recognized – (i) when there is a clear fraud of which the bank had notice and a fraud

of the beneficiary from which it seeks to benefit. The fraud must however be of an egregious nature as to vitiate the entire substratum of the transaction; and (ii) when there are special equities favouring grant of injunction such as when irretrievable injury or injustice would occasion on failure to grant an injunction. In the case on hand neither of the conditions are satisfied and no egregious fraud is either pleaded or established.

Neither the case of the petitioner nor the allegations against the ONGC with regard to the impugned conduct of the ONGC fall within the narrow criteria of factual circumstances which legitimize judicial intervention and interdiction of an unconditional and irrevocable bank guarantee. No case is made out for interference.

The writ petition is accordingly dismissed at the stage of admission.

Dated: 10.04.2006 ----------

Kvrm Justice G. Raghuram